stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The distinction between liquidated damages and penalty has ceased to be of great legal importance because the result in either case is that the court must determine reasonable compensation. As has been said in *Maniam* v. *State of Perak*,[1] "this section boldly cuts the most troublesome knot in the Common Law doctrine of damages". Also in *Bhai Panna Singh* v. *Bhai Arjun Singh* [2] the Privy Council considered the implication of section 74 and stated that the effect of that section is to disentitle the plaintiff to recover simpliciter the sum fixed in the contract whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered unless the sum named is a genuine pre-estimate.

In *Lamdon Trust Ltd.* v. *Hurrell & Anor.*[3] Denning L.J. considered the depreciation clause in a hire purchase agreement which is somewhat similar to our present case. In that case the defendant acquired a car from the plaintiff under a hire purchase agreement. The agreement provided that in case the defendant defaulted the plaintiff would receive by way of compensation for depreciation £425 (three quarters) less instalments already paid. After paying £302 16s. the defendant defaulted and the plaintiff repossessed and later resold the car for £270 and thus received £572 16s. instead of the hire purchase price of £558 16s. Not content with the profit of £14 8s. the plaintiff brought an action to recover £122 4s. under the depreciation clause. It was held that the compensation for depreciation fixed at 75% of the price according to the usual practice, regardless of the condition and state of affairs of the car could not be a genuine pre-estimate of damages, that the sum of £425 was an extravagant and extortionate sum held in terrorem over the head of the hirer and that it was a penalty and as such was not recoverable in law. Denning L.J. in his judgment stated:—

"The sole question for me is, therefore, whether this clause is a penalty clause. I reserved my decision on this question because of the large number of cases which will be affected by it. In considering this question, I take into account these circumstances: (1) The £425 is three-quarters of the total price. It is inserted by the hire-purchase companies by rule of thumb without regard to the make of car, its age, the market conditions or anything of the kind. It is the same for all. (2) The £425 payment for compensation for depreciation is payable on the footing that the car, when it is retaken, is in good order, repair and condition. If it is in bad condition, the owners can recover damages for breach of agreement under clauses 3 and 8 and 15(a), and these damages are payable in addition to the £425. (3) Assume that the car is kept in good condition, and at the end of the first month the hirer makes default and the owners retake the car. Can anyone suppose that in that time the value of it will have dropped by three quarters so that it will be worth only one-quarter of what it was worth a month before? It is an altogether extravagant thing to imagine. (4) Next assume that the car is kept in good condition and at the end of six months the hirer makes default and the owners retake the car. One can understand that it might have dropped to one-half of its value, but not as much as three-quarters. Indeed, when the matter was put to the test, the drop was only one half. (5) Lastly, suppose that the car was let on a simple hiring (without a purchase clause) and the hiring was for one month, or even for six months. The hiring charge would be quite modest — nowhere near £425 — and yet it would have to cover depreciation."

His Lordship then went on to consider the cases where the owners have recovered three-quarters of the depreciation and then went on to conclude:—

"In the present year, 1955, I must, I think, approach the matter afresh in the light of the different circumstances which now exist from the time at which those earlier decisions were given. Looking at this agreement and the conditions under which it was made, I am of opinion that the sum of £425 was not a genuine pre-estimate of damage but was an extravagant and extortionate sum held in terrorem over the head of the hirer. It is a penalty and, as such, it is not recoverable in these courts."

The same consequence need not necessarily follow in our case. Here the depreciation has been fixed at one half of the value of the car for the use from anything from one month to twelve months. It is, of course, a matter of common knowledge that the value of a new car would depreciate as soon as it was taken out of the garage and the claim here was that the car costing $5,987.60 had depreciated by $1,470.70 in approximately eight months. Having regard to the nett resale price I am not prepared to say that the depreciation of $1,470.70 is unreasonable. It appears to me to be a genuine pre-estimate of the damages for depreciation contemplated by the parties at the time when they entered into an agreement. The damages fixed by the parties do not appear to be unreasonable, disproportionate to the nature and extent of depreciation as to warrant the court to interfere to grant relief.

The appeal will, therefore, be allowed to the extent that $1,470.70 be substituted for the award of $239.80 as damages for the breach of the hire purchase agreement. Respondent to pay costs in this court and the court below.

Appeal allowed.

Solicitors: *Eugene Lye & Co.; Oorjitham & Lam.*

KHOO PENG LOONG & ORS. v. SUPERINTENDENT OF LANDS AND SURVEYS, THIRD DIVISION

[O.C.J. (Lee Hun Hoe J., Ong Yen Jin and Ting Lieng Poh, assessors) April 19, 1966]

[Sibu — High Court Civil Suits No. 3 — 6 of 1966]

Land laws — Acquisition of land — Procedure — Amount of compensation — Market value — Land Code (Sarawak Cap. 81), ss 47, 51 & 56.

This was a reference by the Superintendent of Lands and Surveys, to the court under section 57 of the Land Code, arising from objections to compensation offered for lands compulsorily acquired.

Held: (1) the value of the land has to be considered as it stands in its actual condition at the material date with all its existing advantages and all its possibilities but excluding any advantage due to the carrying out of any scheme by Government for which the land is compulsorily acquired; and in this case the fairest and most favourable manner to consider compensation was to take into account the most lucrative and advantageous way in which the owner could dispose of the land with reference to its future utility;

(2) in the circumstances of the case and taking into consideration all the relevant factors the awards of the superintendent were too low and should be increased.

Cases referred to:—

(1) *Superintendent of Lands and Surveys* v. *Aik Hoe & Co. Ltd.* [1966] 1 M.L.J. 243, F.C.

(2) *Superintendent of Lands and Surveys, First Division* v. *Chin Fah Siong* Sarawak Civil Appeal No. 3 of 1959.

(3) *Assistant Development Officer, Bombay* v. *Tayaballi Allibhoy Bohori* A.I.R. 1933 Bom. 361.

(4) *Kailas Chandra* v. *Secretary of State* 17 Cal. L.J. 35.

(5) *Nanyang Manufacturing Co.* v. *Collector of Land, Johore* [1954] M.L.J. 69.

(6) *Vyricheria Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302.

(7) *Inland Revenue Commissioner* v. *Clay* [1914] 3 K.B. 466.

(8) *Collector of Nagpur* v. *Atmaram Bhagwant* A.I.R. 1925 Nagpur 292.

(9) *Maori Trustee* v. *Ministry of Works* [1959] A.C. 1.

CIVIL SUITS consolidated hearing.

George Seah Kim Seng for objectors in suits 3 and 4.

S. K. T. Yong for objectors in suits 5 and 6.

T. S. Abernethy for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: This is a consolidated hearing of four objections against the awards of the Superintendent of Lands and Surveys, Third Division in respect of five lots of land compulsorily acquired by the Government of Sarawak. All five lots are situated at Mission Road, Sibu and three of which fronting Mission Road. Across the road opposite to these lots is a large piece of land owned by the Roman Catholic Mission. On this land can be seen the Catholic Mission School and the Convent. On the same side as the five lots at the extreme end nearer the bridge leading to Channel Road is another piece of land owned by the Roman Catholic Mission with buildings on the land. Behind this mission land and other lots of land, such as Lease 57034, Lease 44180 and Lease 45263 is the Loba Lembangan, an irregular creek which meanders from its mouth near the launches' wharves towards the north. A bridge over the Loba provides a passage from the wharves to Channel Road. Another bridge over the Loba provides a passage from Mission Road to Channel Road.

A notification under section 47 of the Land Code indicating that 44 lots of land situated at Loba Lembangan, Sibu were likely to be needed for development of Sibu Town was published in the *Sarawak Government Gazette* dated 18th May, 1962. Subsequently a declaration under section 48 of the Land Code was published in the said *Gazette* indicating that only 42 lots of land situated at Loba Lembangan were needed "for the development of Sibu Town and other purposes reasonably necessary for such development, including the provision of residential accomodation, open spaces and amenities.". Pursuant to section 49 of the Land Code the Superintendent duly caused notices to be served on the registered proprietors of the 42 lots of land. The objectors were among those served and they submitted written statements putting forward their claims to compensation.

An inquiry under section 51 of the Land Code was conducted by the Superintendent. On 5th November, 1964 he made his awards. For convenience his awards and brief particulars of the land of the four objectors are set out as follows:—

	Description of land	*Area*	*Amount Awarded*
O.T. 20883	(hereinafter referred to as Lot I)	0.22 acre	$26,400.00
Grant 121-F	(hereinafter referred to as Lot II)	0.36 acre	$41,500.00
Lease 44180	(hereinafter referred to as Lot III)	0.57 acre	$36,000.00
Lease 57034	(hereinafter referred to as Lot IV)	0.402 acre	$53,400.00
Lease 57035	(hereinafter referred to as Lot V).	0.272 acre	$51,600.00

Pursuant to section 56 of the Land Code those objectors submitted written applications to the Superintendent requesting him to refer the matters for the determination of this court. On 12th January, 1966 the Superintendent referred the matters under section 57 of the Land Code to this court. In respect of each objection he submitted a statutory statement. In each case he stated that the amount of compensation was determined by evidence submitted by the Government valuer and the solicitors for the owner or owners and the evidence of value gained in conducting prior negotiations with the owner or owners. This sort of generalisation does not assist the court very much particularly when his final award in each case shows that he gave a very small margin above the figure given by the Government valuer. The Superintendent did not say so but in all cases it would seem that he relied to a large extent on the Government valuer's figures as the basis of his awards.

Mr. Seah appeared for the objectors to Lot I and Lot II. Mr. Yong appeared for objectors to Lot III, Lot IV and Lot V. The last two lots represent one objection. Mr. Abernethy appeared for the Superintendent in all cases. Pursuant to section 59(1) of the Land Code the court appointed Mr. Ong Yen Jin and Mr. Ting Lieng Poh as assessors. Mr. Ong had previously sat as assessor in such a reference. Mr. Ting was a former Assistant Registrar of this court. The provisions of sections 60, 61 and 62 were read and explained to them. At their request copies of the said provisions were made available to them.

In the recent appeal of *Superintendent of Lands and Surveys* v. *Aik Hoe & Co. Ltd.*[1] both the Lord President and the Acting Chief Justice of Malaya concurred with the judgment of Suffian J. The question of procedure was raised and reference made to the case of *Superintendent of Lands and Surveys, First Division* v. *Chin Fah Siong* [2] which was heard by the former Court of Appeal of Sarawak, North Borneo and Brunei. Since the procedure adopted here was different from that followed by the High Court in Malaya the Federal Court was invited to make a ruling so that there should be uniformity throughout Malaysia.

No clear procedure was laid down in the Land Code. As Suffian J. said in the *Aik Hoe & Company case* [1] he could find nothing in it to make it obligatory for the judge to sum up in every case and considered that the discretion rests with the judge. I agree that in a simple case it would probably be convenient to sum up. I consider the present reference rather complicated as it is a consolidated hearing of four objections involving five lots of land. I did not sum up but made clear that I intended to follow as closely as possible the Malayan procedure. Since Malaysia the High Court in Borneo has adopted, subject to certain modifications, the Rules of the Supreme Court, 1957. The inclination is towards uniformity in procedural matters. For myself I believe that it is not only healthy but also desirable that practice and procedure in the High Courts in Malaysia should be uniform.

The issue is the amount of compensation. In determining this the court must take into consideration "the market value at the date of the publication of the notification under section 47". The material date is *18th May, 1962.* Any disinclination of the person interested to part with the land must be disregarded. Similarly any increase in the value of the land resumed likely to accrue from the use to which it will be put when resumed must be disregarded. This makes clear that any advantage due to the carrying out of any scheme by the Government for the purpose for which the land is compulsorily acquired must be disregarded.

Section 62(1) of the Land Code makes it clear that where an applicant or objector made a claim for compensation the amount to be awarded by the court shall not exceed the amount claimed or be less than the amount awarded by the Superintendent. The awards of the Superintendent have already been set out. What are the claims of the objectors? Except for the objector of Lot III who claims $110,000 at the rate of $150,000 per acre the other objectors claimed at the rate of $20 per sq. ft. The amounts they claimed were:—

Lot I	$188,368.03
Lot II	$307,420.00
Lot IV	$400,220.00
Lot V	$266,960.00.

On this basis Lot III is claiming rougnly over three times the award and Lot I, Lot II and Lot IV are each claiming roughly over seven times the award. Lot V is claiming roughly over five times the award.

Since the hearing the objectors have revised their claims. Objector to Lot I is now claiming $155,724. He based his claim on the basis of four shoplots of 2,000 sq. ft. each at $20 per sq. ft. The total amount is $160,000 less filling agreed by the parties at $4,276. Objector for Lot II is claiming $231,506. He also based his claim on the basis of six shoplots of 2,000 sq. ft. at $20 per sq. ft. The total amount is $240,000 less filling agreed by the parties at $8,494. Objector to Lot IV and Lot V based his claim on the basis that four shoplots and six godown lots could be carved out from his two parcels of land. He is now claiming $208,000 for Lot IV and $128,000 for Lot V making a total claim of $336,000 less $20,000 for filling agreed by the parties. That is $316,000.

It is unfortunate that the objectors did not see fit to call an expert on valuation. After all their claims are of such amounts which cannot be left to speculative methods of valuation. Appraisement of value of land is a matter of great difficulty and is an art to be acquired by experience. Many things have to be considered before one can be satisfied with the conclusion. Lim Chee Au, the Assistant Manager of Kwong Lee Bank was called to give his opinion as to the value of Lot I. He said Lot I was charged to the bank for $20,000 in 1956. At that time he estimated that the property would be worth $50,000. The bank was aware of the fact that the house on Lot I was demolished in 1961. He assessed the vacant land then would be worth $100,000. There is no doubt that there is some substance in what he said about Lot I, that is, it is a good site and that all types of building could be built on it particularly such as shophouses and commercial offices. It must be

remembered the bank has an interest in this land and the witness might easily have exaggerated the value of the land. We are not saying that Lot I is not a valuable piece of land. But the witness has not satisfied the court as to the basis of his valuation. He did not tell the court how he estimated the value except that he used to inspect property before the bank lent money with the property as security and that the site was good. That sort of valuation is a dangerous criterion for the court to rely on. As to Lot II he estimated the value in 1961 to be $200,000 because the land is bigger than Lot I.

Mr. Lumb, the Government valuer, is a fellow of the Chartered Auctioneers and Estate Agents' Institute and has been in the profession some 22 years. He has been in Sarawak since 1960. He did the valuation of the five lots. His valuation notes were to be found annexed to the statutory statements. He said that he did consider the sales of shoplots but considered them to be irrelevant. He does not think they are comparable. We agree with him on this point. Shoplots are small in area and have been comprehensively planned. Roads and access roads are provided for. Also open spaces and parking spaces are provided. Other facilities are available. He said that in 1961 there was a demand for shoplots but this demand was pretty well covered by the auction sale of shoplots in 1962. He mentioned that the Loba has effect on the value of the property of the objectors. Development of the area could not possibly take place until such time as the Loba has been improved somehow. Adequate access has to be made from the central area over the Loba to the property of the objectors. This may be true if it is the development of the whole area. The development of the port and surrounding areas close to Mission Road must necessarily enhance the value of the area to a considerable extent. He also prepared a plan (exhibit D.5) showing comparative sales of lands in the district. He referred to certain sales which he thought were relevant. He also did work out alternative methods of valuation for Lot I. He said no method could beat the comparative sale method. He admitted that except for one sale all sales he used for his comparative method valuation are land with agricultural title. His explanation was that until 1960 the Lands and Surveys Department did very little to insist that conditions of title were enforced. That is no insistence that conditions should change. Then in 1960 the department began to regularise the position. That was why he said the public might not have regard to agricultural restriction on the title. He pointed out that there was no evidence to show that agricultural title fetched less than residential title. Since 1963 the public are becoming more aware of the benefits of an "open title". The price is therefore more for land with "open title". He mentioned that price realised in 1963 was less than in 1961 and that this suggests that sale in 1961 was speculative.

He was cross-examined by counsel for the objectors as to various matters in some details. He admitted that Lease 45263 containing 0.13 acre and adjacent to Lease 44180 was settled after the award was made for $22,000 roughly equivalent to $169,200 per acre. The settlement was worked out on the capitalised rental basis of $1,560 annual rental and capitalised on 16.4 years' purchase. He said the land is small in size and it was one of the cases which was settled by negotiation. He thought the amount high but it was in an effort to settle that the amount was agreed.

Parties are agreed that post notification sales should be taken into consideration if they are relevant and afford assistance in determining the value of the lands. This view is clearly stated by Broomfield J. in *Assistant Development Officer, Bombay* v. *Tayaballi Allibhoy Bohori* [8] at page 363 and was quoted with approval by the Federal Court in the *Aik Hoe & Company case* [2]:—

> ".....I doubt if anything can be found in those authorities which would justify the conclusion that post notification transactions must necessarily be ignored altogether. All transactions must be relevant which can fairly be said to afford a fair criterion of the value of the property as at the date of the notification. If any considerable interval has elapsed the court will naturally attach little or no value to the subsequent sales, just as transactions long prior to the notification will usually be discarded.".

Record of Sales (Sibu Town) Exhibit P.11 shows four sales.

(i) Lease 40746 containing 0.78 acre was sold on 12th February, 1962 for $98,000 equivalent to $125,641 per acre. This land is at Kampong Pulau and low lying and has no building on it.

The next three parcels of land are all situated at Lanang Road which is subject to tidal flood at least twice a month. In each case premium was paid varying in amount on conversion of the agricultural title.

(ii) Lease 49444 containing 0.25 acre was sold on 9th October, 1962 for $28,000 equivalent to $112,000 per acre. This land has no building on it and was converted to one for industrial purposes in 1963 on payment of premium of $2,500 and rental at $160 per annum.

(iii) Grant 865 containing 0.25 acre was sold on 16th February, 1963 for $43,000 equivalent to $126,476 per acre. Premium paid was $3,950. This land has no building on it and is low lying.

(iv) Lease 56743 containing 0.25 acre was sold on 16th March, 1963 for $17,000 equivalent to $136,000 per acre. Premium paid was $5,890 and rental at $200 per annum. The title for agricultural purposes was converted in 1957.

Mr. Lumb, the Government valuer, also relied on comparative sales of mixed zone town land under agricultural titles with the exception of one. The sales data of Sibu Town District,

Exhibit D.1, shows 29 sales. He was examined on some of the relevant sales.

(i) Sale No. 10. Grant 1258 containing 0.75 acre with four old buildings was sold on 6th November, 1962 for $85,000 equivalent to $116,438 per acre. The four buildings were demolished. Land is fairly level but low lying. It was sold again on 15th July, 1964 for $100,000 equivalent to $136,986 per acre.

(ii) Sale No. 13. Lease 50297 containing 0.52 acre was sold on 2nd November, 1960 for $49,500 equivalent to $95,192 per acre. There were subsequent sales of 1/5th share and 4/30th share at a price representing much less per acre.

(iii) Sale No. 14. Lease 44180 containing 0.57 acre is one of the lots under reference. 1/5th share was sold on 27th November, 1961 for $4,250 equivalent to $37,281 per acre. In 1959 another sale of 1/5th share fetched $4,250. And in 1957 yet another sale of 1/5th share fetched $4,000. This land has certain restriction, i.e. land is for residential purpose only. There are two very old houses on the land which is low lying and swampy. Extensive filling is required. There is no proper access to Mission Road.

(iv) Sale No. 15. Lease 51073 containing 0.33 acre was sold on 2nd November, 1960 for $25,000 and resold for similar amount on 6th December, 1961 equivalent to $75,000 per acre. Land is held under agricultural title and has been developed for godown.

(v) Sale No. 17. O.T. 30445 containing 0.33 acre is held under residential title and has two very old houses in poor condition. The land is swampy and approach is by plank walk from Pulau Babi. 1/2th share was sold on 28th December, 1964 for $30,000 equivalent to $181,818 per acre.

(vi) Sale No. 29. Lease 40746 containing 0.78 acre was sold on 18th October, 1961 for $40,000 equivalent to $51,410 per acre. About four months later it was resold on 12th February, 1962 for $98,000 equivalent to $125,641 per acre. This is one exception I mentioned previously. This land is held under "open title" and has no building on it. According to Mr. Lumb three months after the last sale the Government indicated its desire to acquire the land but subsequently Government changed its mind. He thought the last sale was suspicious. However he agreed with Mr. Seah that originally the title was for dwelling house but condition was later revoked. He also agreed that this parcel is a second lot and has no road frontage.

Those sales are mostly concerned with lands for agricultural purposes and confined to Lanang Road area but within the industrial zone. The fact that the agricultural title may be converted to one for industrial purposes clearly accounts for the value of the lands there despite payments of premium and in some cases annual rent on conversion and not forgetting that Lanang Road is subject to tidal flood. It does not seem that those sales provide conditions which are similar to the five lots at Mission Road. Those sales do not provide similar potentialities or are near the locality. It is appreciated that no two plots of land can be precisely similar in all circumstances and conditions. Only sales of similar land in the neighbourhood within a reasonable time are helpful in determining the market value in any land. Differences there must always be and it is necessary to make allowances for such differences. Valuation will be difficult if there is no similarity. Sales of land even within the vicinity are sometimes not relevant unless those lands and the lands under acquisition are similarly circumstanced and situated. Lands fronting the main road are always more valuable than those directly behind. Mr. Lumb did say that the lots fronting Mission Road would be more valuable than the two lots at the rear.

What is then the "market value" and how does the court arrive at such value.

Although section 60 of the Land Code refers to "market value" nowhere in the Code is the term defined. The definition of Jenkins C.J. in *Kailas Chandra* v. *Secretary of State* [4] was adopted by Buhagiar J. in *Nanyang Manufacturing Co.* v. *The Collector of Land, Johore* [5] and had since been quoted with approval by our courts. The definition reads:—

"The market value of land may be roughly described as the price that an owner willing, and not obliged to sell might reasonably expect to obtain from a willing purchaser of the land."

The headnote in the latter case reads:—

"In arriving at this price there are 3 recognised methods of valuation, viz.:

(1) opinion of experts;

(2) the price paid, within a reasonable time, in *bona fide* transactions of purchases of lands acquired, or of the lands adjacent to the land acquired and possessing similar advantages; and

(3) a number of years' purchase of the actual or immediately prospective profit from the lands acquired.

In considering expert opinion too much weight should not be given unless it is supported by, or coincides with, other evidence. Neither should the court consider an offer to purchase. The safest guide to determine the fair market value is evidence of sales of the same land or similar land in the neighbourhood after making due allowance for all the circumstances.".

In determining the amount of compensation the principles applicable in no way differ from those under the Indian Land Acquisition Act, 1894. In *Vyricheria Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [6] Lord Romer said at page 312:—

"There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by 'the market value'.... But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities.".

He continued at page 313 as follows:—

"For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined.....but also by reference to the uses to which it is reasonably capable of being put in the future. It is a self-evident one. No one can suppose in the case of land which at the valuation date is waste land or is being used for agricultural purposes, that the owner however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is equally plain, however, that the land must not be valued as though it had already been built upon a proposition that is embodied in section 24, sub-section 5, of the Act (corresponding to paragraph (e) of section 61 of the Land Code) and is sometimes expressed by the saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.".

In answer to Mr. Seah about the list (Exhibit D.1) Mr. Lumb said he did not agree that those sales are not comparable for the purpose of valuing the five lots. His reason being that prior to 1962 the buying public were little concerned with the title condition and until that date very little attempt was made by the Lands and Surveys Department to regularise agricultural lot used for residential or industrial purpose. Nevertheless there is evidence that conversion of title occurred as far as 1957 in respect of Lease 56743. But according to Mr. Lumb the said department began to regularise titles in 1960. It is purely a matter of opinion whether the public were aware of the necessity to convert titles in 1962. Mr. Lumb admitted in answer to Mr. Seah that he valued the property basically as residential. This is important. He valued the property as residential by comparing them with property with agricultural title. He said he used development method to assist the Superintendent in respect of Lot I. Only one lot is strictly speaking subject to restriction for residential purpose only. The other four lots are held under "open title" and not subject to restrictions of any kind. In answer to question by Mr. Seah on Sale No. 10 — Grant 1258 Mr. Lumb agreed that if this land was held under "open title" it would be more valuable. There is no evidence to show that the Superintendent and Mr. Lumb in arriving at their respective estimated market value of the five lots particularly the three lots having road frontage took into consideration all the advantages and potentialities in the sense that they are in the commercial zone and within Sibu centre (see exhibit P.2) and also the Government's intention to set up a port authority which must necessarily enhance their value as compared with lands for agricultural purposes only. Mr. Lumb had admitted he valued the property basically as residential. The three lots with road frontage have the advantage of "open title" and are not in close proximity to the Loba. In *Vyricheria Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [6] Lord Romer said at page 317 referred to *Inland Revenue Commissioner* v. *Clay* [7] where Lord Cozens-Hardy M.R. said:

"To say that a small farm in the middle of a wealthy landowner's estate is to be valued without, reference to the fact that he will probably be willing to pay a large price but solely with reference to its ordinary agricultural value, seems to me to be absurd.".

The owners of the following parcels of land appeared to have protested against the awards of the Superintendent who later made some increases which were accepted and settled:—

Lease 45263,	0.13 acre,	$22,000 ($169,200 per acre)	an increase of $8,000
Lease 41332,	0.26 acre,	$41,500 ($159,600 per acre)	an increase of $11,500
Lease 46715,	0.76 acre,	$75,000 ($98,680 per acre)	an increase of $34,000
Lease 46301,	0.27 acre,	$35,000 ($129,600 per acre)	an increase of $8,000
Lease 46782,	0.27 acre,	$38,000 ($140,700 per acre)	an increase of $8,200
Lease 46302,	0.29 acre,	$21,000 ($72,400 per acre)	an increase of $7,900
Lease 45135,	0.26 acre,	$22,000 ($84,600 per acre)	an increase of $9,200
Lease 46783,	0.23 acre,	$27,333 ($118,800 per acre).	an increase of $10,233

Reference has previously been made to Lease 45263. The two registered proprietors of this land are also two of the registered proprietors of Lot III. This brings me to what Suffian J. said in *Aik Hoe & Company case* [1] at page 247:—

"The headnote to *Collector of Nagpur* v. *Atmaram Bhagwant* [8] reads:—

'Acceptance of collector's award as correct valuation by neighbouring owners is the evidence of correctness of the award by the collector.'

I agree with counsel for the superintendent that this goes too far and it is only the acceptance of a large award that could be interpreted as correctness of an award by the superintendent. Recipients of awards in small amounts may be dissatisfied but sometimes do not think it worth while appealing because of the expense and delay involved".

Mr. Abernethy contended that the settlement of Lease 45263 is in respect of a small parcel of land and the court should not regard it as a sale. We agree that the Superintendent was unduly generous. However it would appear from *Aik Hoe & Company case* [1] that such awards and settlements may be taken into consideration. The awards and settlements varied from $72,400 to $169,200 per acre.

Lease 45263 is tucked away in a corner and very close to the Loba and has no proper access but seems to come out best in the settlement. Lease 41332 is irregular in shape and has no road frontage as it is immediately behind Lot I came out second best in the settlement. Another plot is Lease 46782 which is also irregular in shape and has no road frontage came out third. On the other hand Lease 46715 which is the largest in size in the area and has the advantage

of being bounded by Mission Road and Lanang Road appears to come out worst in the settlement. Lease 46783 which is situated in between Lot I and Lease 46715 and has the advantage of fronting Mission Road also did not come out well.

Those awards and settlements must necessarily affect the court's consideration of the value of the five lots under reference. The three lots fronting Mission Road are certainly more valuable than those at the rear and adjacent to the Loba. In our view their potential values are much higher not only than those at the rear but also than those at Lanang Road. This is because Lanang Road area is invariably low lying and the road is subject to tidal flood and outside Sibu central. Further the potentiality of land at Lanang Road is limited.

Most of the cases referred to by parties relate to acquisition of large tract of land. In this reference all the lots are under an acre in size. In fact with the exception one lot which is slightly over half an acre the other lots are under half an acre in size. Also the lots are within Sibu central separated as it is by the Loba.

Though the five lots are in the commercial zone there is no evidence of any detailed developments for the area prior to the acquisition. Nevertheless the Superintendent thought he would expect the commercial zone to be developed. He further conceded that he could not object if land in a commercial zone was developed for commercial purposes. It is true that the objectors have considered the costs of fill to various levels but they have not taken into consideration other development costs, risk and delay which a developer would have to meet in the development of the lands. The objectors of four lots approach the problem on the basis that the lands would be suitable for subdivision into shop-lots and in one case into godown lots and therefore compensation should be awarded on that basis less the costs of filling. There is the evidence of the abortive auction sales of godown sites which seem to indicate that there is no general demand or market for this type of building. Further there is the opinion of the divisional engineer as to the necessity of constructing retaining walls on land close to the Loba, roads and culverts. In our opinion their approach is wrong and was based on false premises. There was in fact no subdivision and no evidence of any such layout plan being approved by any authority. To give them compensation on such basis would tantamount to giving them compensation for unrealised possibilities as if they were realised possibilities. In *Maori Trustee* v. *Ministry of Works* [9] Lord Keith of Avonholm quoted with approval what was said by Gresson J. at page 16:—

> "There must be excluded from the court's contemplation retention by the claimant and an assessment of what in his hands it would yield if subdivided, because that course is not open to him. At the time value has to be determined the land was in fact not — legally speaking — subdivided so as to permit of sale piecemeal. A good deal requires to be done before there can be disposal in that manner, and as well as expenses there will be risk and delay."

Objector to Lot I mentioned an offer from a friend of his to buy his land at $9 per sq. ft. and he was prepared to sell but because Government was going to acquire his land the sale did not go through. He said he wanted to sell to his friend on the understanding of having a share in the development. It is difficult to know whether the offer is genuine or not since the person who was supposed to make the offer did not come forward to testify. We would disregard this offer. The passage quoted previously from *Nanyang Manufacturing Co.* v. *The Collector of Inland Revenue, Johore* [5] makes this clear.

Another point that his land was charged to a bank and with interest accumulated has now amounted to a considerable sum does not necessarily mean that the property must also worth that much. It must be remembered the loan was for $20,000 only. The most generous view we can take is that when the bank lent the money it was probabiy satisfied that the property was worth more than the loan.

The value of the land has to be considered as it stands in its actual condition at the material date with all its existing advantages and all its possibilities but excluding any advantage due to the carrying out of any scheme by Government for which the land is compulsorily acquired. In this case we consider that the fairest and most favourable manner to consider compensation is to take into account the most lucrative and advantageous way which the owner can dispose of his land with reference to its future utility. The market price of land is always affected by its future utility. This can be seen by the sales of land with agricultural title at Lanang Road. However care must be taken to see that such estimate is not based on mere speculation and impractical imagination. It must be based on sound and prudent business calculation.

Mr. Lumb admitted valuing the lands basically as residential. He relied to a large extent on comparative value of sales of land for agricultural purposes. It has not been seriously contended that the three lots fronting Mission Road could not be used for building purposes. Land which may probably be used for building or commercial purposes should not be valued on the same basis as land for agricultural purposes.

Having regard to all the evidence we agree that the awards are inadequate in the circumstances. On the other hand we agree with Mr. Abernethy that the claims of the objectors are

fantastic. It is a fallacy to value land as if it had already been built upon. The court is concerned with its possibilities and not its realised possibilities. In this reference we are unanimous in our awards. Almost everyone in this case has his own set of figures for each lot. Each one is open to criticism including our figures. The value to be put on a plot of land, which is not in the market or subject to genuine bargain or genuine sale, but owes its value to its unique position in a commercial zone, is a matter which opinion will differ. This is rendered more difficult because it is impossible to give irrefragable reasons for any conclusion.

Lot I. Mr. Lumb valued the land of 0.22 acre at $24,200 equivalent to $110,000 per acre. Using other methods of valuation he arrived at much lesser amounts. In the statutory statement (Schedule F) he used the development valuation method by subdividing the land into four shoplots and giving each lot $10,000. He admitted that this valuation was done in a hurry as the Superintendent would like to have his valuation on this method. Subsequently by the same method he subdivided the land into three shoplots after making allowances for roads, open spaces, etc. He estimated each lot at $15,000. No reason was given as to how he arrived at this figure. In our view this figure is unrealistic. We would give a figure of $25,000 per lot. Each lot could be of 2,400 sq. ft. or more. Three or four storeys building could be put up.

Thus three shoplots @ $25,000		= $75,000
Less:		
Costs of filing and removing concrete raft as agreed by parties	$ 4,276	
Loss of income for 1½ years at 5% of $75,000	5,625	
Developer's risk 20% of $75,000	15,000	
Cost of survey, subdivision, transfer, etc.	800	$25,701
		$49,299

On the other hand by valuing the land alone having regard to all the factors we would give $50,600 equivalent to $230,000 per acre. Apart from other advantages the level of this land is the highest in the area.

Lot II. Under value for improvements Mr. Lumb gave the building $14,873 removal costs and cultivation $142 thus making an amount of $15,015. During cross-examination by Mr. Seah on the minute to the Superintendent Mr. Lumb mentioned that another $3,000 for the building would not be unreasonable. In which case the building would be $17,873. If this amount is added to removal cost and cultivation of $142 it would amount to $18,015. Under unimproved value for land of 0.36 he gave $25,000 equivalent to $70,000 per acre. We do not agree with this figure as it is far too low having regard to the evidence. We would say $160,000 per acre to be more reasonable. This would give a figure of $57,600. The total amount would be $75,615.

Lot III. Mr. Lumb based his valuation on the capitalised rental method. From the annual rental of $3,600 he deducted rates, repairs and insurance and ground rent of $433.60. This gives a figure of $3,166.40 which he capitalised at 9% (or 11.1 years' purchase) resulting in the amount of $35,182. A sum of $270 for cultivation and removal costs was added producing a final amount of $35,452. He suggested a round figure of $36,000. Unlike the other four lots this land is subject to restriction and has no proper access and is adjacent to the Loba. This lot is nevertheless better than Lease 45263. The objector mentioned the annual rental of $3,960 which was not seriously disputed. This figure, if less $433.60, would give a sum of $3,526.40. We would capitalise at 11½ years' purchase. This gives a figure of $40,553.60 and by adding $270 the final figure would be $40,823.60.

Lot IV. There are two buildings on the land. One was rented which Mr. Lumb based his valuation by the capitalised rental method. He capitalised at 10% (or 10 years' purchase) obtaining a figure of $32,600. The other building was owner occupied. He valued it in the same way as Lot I. He obtained an amount of $19,693. The two amounts are then added together to give a final figure of $52,293. He suggested a round figure of $53,000.

The objector to this lot mentioned that the annual rental should be $3,900 and not $3,600. This has not been seriously disputed. Therefore based on this new rental of $3,900 the net rental after deducting rates of 10%, etc. would be $3,510. We would capitalise at (12¾ years' purchase). This would give an amount of $44,752.50. As for the owner occupied building we agree with Mr. Lumb on the amounts of value of improvement at $9,392 and removal cost at $200. However we do not agree with the sum of $10,050 for unimproved value of land of 0.201 at $50,000. We would increase this to $12,060 at $60,000 per acre. The amount under this head would then be $21,652. The two amounts added together would give a final figure of $66,404.50.

Lot V. In this case Mr. Lumb used the capitalised rental method by capitalising at 10% (or 10 years' purchase). The annual rental is $5,760 less rates, etc. of $676 giving a net rental of $5,084. Cultivation and removal costs amount to $110. He arrived at a figure of $50,950. He suggested a round figure of $51,000. This land has a road frontage but a lot of filling would be necessary. Nevertheless it is a much more

valuable lot than the one at the rear. Lumb did not dispute rent could be $6,000 per annum. Thus less rates at 10% would be $600. Repairs and insurance we would say $200. Net annual rental would be $5,200. We would also capitalise at (12¾ years' purchase). This would give a figure of $66,300 and by adding $110 the final figure would be $66,410.

Having regard to the evidence and taking into consideration various factors which were not taken into consideration by the Superintendent it is not unreasonable to say that the fair and proper value to be given to the five lots at the material date should be as follows:—

For Lot I	$50,600	an increase of $24,200
For Lot II	$75,615	an increase of $34,115
For Lot III	$40,823.50	an increase of $4,823.60
For Lot IV	$66,404.50	an increase of $13,004.50
For Lot V	$66,410	an increase of $14,810.

The Superintendent's awards are varied accordingly. The above awards are made under section 60(a) of the Land Code and no other sum is awarded under (b), (c), (d), (e) or (f) of the said section. It is noted that objectors of Lots III, IV and V accepted the awards under protest. Pursuant to section 69 of the Land Code the Superintendent shall pay interest on the excess at 4% per annum on the said three lots from the date he took possession. Objectors of Lots I and II did not accept the awards and also such compensations were not paid into court deposit. Therefore pursuant to section 72 the Superintendent shall pay interest on the whole amount awarded at 4% per annum from the date he took possession.

[After arguments on costs his Lordship directs that the respondent pays each assessor $200 and that apart from this each party to pay his own cost].

Order accordingly.

SINGARAM v. FERNANDO & ANOR.

[A.C.J. (MacIntyre J.) April 22, 1966]

[Ipoh — Court Appeal No. 2 of 1966]

Landlord and Tenant — Notice to quit — Notice terminating tenancy on last date of Gregorian month — Validity of.

This was an appeal against the decision of the president of the sessions court whereby the appellant was ordered to give up vacant possession of premises in Kuala Kangsar. The principal ground of appeal was that the notice to quit which required the appellant to vacate and deliver up possession of the premises on or before July 31, 1962, was invalid as there was no evidence that the last day of the current period of tenancy fell on the last day of the month according to the Gregorian calendar.

Held: the weight of evidence in this case showed that the tenancy was on a monthly basis commencing on the first day of the month and ending on the last day of the month and therefore, the notice to quit in this case was valid.

Cases referred to:—

(1) *Lemon* v. *Lardeur* [1946] 1 K.B. 613.

(2) *Bathavon Rural District Council* v. *Carlile* [1958] 1 Q.B. 461.

(3) *Ko Teck Kim* v. *Watkinson* [1961] M.L.J. 73.

(4) *Migotti* v. *Colvill* (1878-9), 4 C.P.D. 233.

(5) *Hankey* v. *Clavering* [1942] 2 K.B. 326.

CIVIL APPEAL.

P. P. Dharmananda for the appellant.

M. Edgar (*T. C. Tang* with him) for the respondents.

MacIntyre J.: This is an appeal against the decision of the learned president of the sessions court at Kuala Kangsar in a tenancy action brought by the respondents whereby the appellant herein was ordered to give up vacant possession of premises No. 9-B, Kenas Road, Kuala Kangsar.

The house in question was built by the appellant on a portion of land held under E.M.R. 1231, Lot 102, Mukim Saiong, district of Kuala Kangsar, of which an undivided 1/4th share belongs to the estate of one W. R. Fernando (deceased) of which the 1st respondent is the present administrator and the remaining 3/4th share is registered in the name of the 2nd respondent herein.

The tenancy agreement in respect of the premises was an oral one as evidenced by a letter of consent dated the 2nd of September 1953 and marked D.3, according to which one V. Fernando, the then administrator of the estate of the aforesaid deceased consented to allow the appellant to build a dwelling house for himself and to accept a rent of $5 per month from the date of completion of the said house.

At the hearing of this appeal counsel for the appellant abandoned the ground of appeal mentioned in paragraph 7 of the memorandum and both counsel agreed that the tenancy was a monthly tenancy. The only point in issue was the validity of the notice to quit (D.4) dated the 9th of June 1962 which required of the appellant to vacate and deliver possession of the premises on or before the 31st day of July 1962.

Counsel for the appellant submitted that the validity of the notice to quit depended on whether or not the last day of the current period of tenancy fell on the last day of the month according to the Gregorian Calendar; and contended that since the respondents, on whom lay the onus of proof of the date of termination of the tenancy had failed to discharge that burden, the action should have been dismissed. In support of this contention, he cited *Lemon* v. *Lardeur* [1]; and